IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 5, 2005 Session

JOYCE L. ELKINS, ET AL. v. HAWKINS COUNTY, TENNESSEE

Appeal from the Circuit Court for Hawkins County
No. 9809 Kindall T. Lawson, Judge

No. E2004-02184-COA-R3-CV - FILED MAY 19, 2005

Joyce L. Elkins ("the plaintiff") and her husband, Rondal Elkins[1], brought this action pursuant to the Governmental Tort Liability Act ("the GTLA"), Tenn. Code Ann. § 29-20-101, *et seq.*, seeking damages flowing from the injuries sustained by the plaintiff when she tripped and fell as she entered a bathroom in the basement of the Hawkins County Courthouse. She tripped on the threshold at the entrance to the bathroom; her fall resulted in a broken hip. At the time of this incident, the hallway adjacent to the bathroom was dimly lit. The plaintiff and her husband allege that the county was negligent in failing to correct or warn about the dangerous condition created by the threshold and the deficient lighting in the hallway. Following a bench trial, the court found that the condition created by the raised threshold and the position of the lighting created a dangerous condition. The court further found that this condition had existed for a substantial period of time so as to place the county on notice of its existence. The county appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Jeffrey M. Ward and Thomas J. Garland, Jr., Greeneville, Tennessee, for the appellant, Hawkins County, Tennessee.

Phillip L. Boyd, Rogersville, Tennessee, for the appellees, Joyce L. Elkins and husband, Rondal Elkins.

OPINION

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[1] For ease of reference, we will refer to the plaintiff Joyce L. Elkins as the singular "plaintiff."

I.

On March 22, 2000, the plaintiff arrived at the Hawkins County Courthouse with her husband, Rondal Elkins, and their two adult daughters, Melody Head and Cynthia Sue Mullins. While there, the plaintiff and Ms. Head went downstairs to use the women's restroom located in the basement.

The courthouse was built in 1836. In the basement, there is a hallway that leads to the men's and women's restrooms. The photographs in the record reflect that the hallway has a neutral-colored floor. Entry to the women's restroom is down the hall and to the right. At the bathroom door is a raised threshold which is 1.5 to 1.75 inches higher than the level of the hall floor. From the photographs, it appears that the top of the threshold is level; is 6 to 12 inches in depth; and goes under the bathroom door. We assume, but do not know, that the top of the threshold is level with the bathroom floor. The hallway is illuminated by an elongated fluorescent light fixture.

The plaintiff walked down the hallway behind her daughter. Both the plaintiff and Ms. Head testified at trial that the hallway was dimly lit. Ms. Head stepped onto the threshold and entered the bathroom. She testified that she did notice the threshold. The plaintiff followed her daughter and, as previously stated, tripped over the threshold. As a result, she fell and sustained a broken hip. Upon hearing Ms. Head yell that the plaintiff had fallen, Mr. Elkins and Ms. Mullins rushed downstairs.

On May 10, 2000, the plaintiff and her husband filed this action against the county pursuant to the GTLA. In the complaint, they averred that the county was guilty of negligence (1) in failing to place identifiable markings or colored warning devices near the entrance to the restroom; (2) in failing to orally warn the plaintiff of the "dangerous entryway"; (3) in failing to maintain adequate lighting in the area; and (4) in configuring the elevated threshold in a way that rendered it not readily visible. The plaintiff's husband alleged a loss of consortium. By its answer, the county responded that no dangerous or defective condition existed at the entrance to the restroom and that it did not have actual or constructive notice of any dangerous or defective condition. As an affirmative defense, the county contended that the nature and condition of the threshold was open and obvious such that the plaintiff and her husband are barred from recovery. The county also charged that the plaintiff was guilty of fault in this matter.

At the bench trial, the court received testimony from several witnesses. The plaintiff described the lighting in the hallway as dim, "like . . . in the sunshine and you go into a dark place, how it looks so dark that you can't hardly see anything." Melody Head, the daughter who was with the plaintiff when she fell, testified that the hallway was dim and dark. The plaintiff said that this condition prevented her from observing that she had to step up at the door to enter the bathroom. Wayne Courtney and Randy Delph, the EMS technicians who responded to the scene, testified that it seemed dark in the hallway such that it was difficult to determine if the plaintiff sustained bruises or swelling. Someone opened the door to the outside to permit more light in the hallway while the technicians were tending to the plaintiff. Cynthia Mullins testified that the hallway was dim, and that the primary source of light appeared to be coming from lights in the bathroom.

The plaintiff called James Skeen to testify as an expert witness. Mr. Skeen is an engineer with Tennessee Eastman. He testified about the threshold, calling it a "significant tripping hazard." He stated that, as a person approaches the threshold and the bathroom door, his or her body would be between the door and the fluorescent lighting located to the person's rear.

At the close of the plaintiff's evidence, the county moved for a directed verdict, arguing that, although there was evidence that the lighting was "dim" on the day of the incident, there was no evidence of how long it had been in that condition. It contended that the plaintiff's claim based upon a dangerous condition because of the threshold and lighting could not be sustained because there was insufficient evidence of notice. The trial court denied the motion, noting that it appeared that the threshold and the location of the lighting fixture had been there for some time and that this was evidence of notice to the county.

The county then called Oscar Burns as a witness on its behalf. At the time of the incident, Mr. Burns worked for the county as a maintenance worker. For approximately 15 years, he had been charged with the task of cleaning the bathrooms each day. He stated that he cleaned the bathrooms on the morning in question prior to the plaintiff's fall. He did not notice that any of the bulbs in the hallway had burned out. He testified that, had that been the case, he would have replaced the burnt-out bulb upon discovering it. Carol Wallace, the receptionist for the purchasing clerk at the county mayor's office, also testified for the defense. She reported that her search of reports of prior incidents arising from the restroom area produced no results.

II.

At the conclusion of the trial, the court rendered its opinion from the bench, stating

> [t]here's a condition there with that step. That – whether we call it a step or a threshold or whatever it is. It's somewhere in between, and I think that's important that it is somewhere in between. That's a problem. And it's one that has existed for a long time. And I'm not going to simply decide whether that alone is enough. I think there's evidence before the [c]ourt that the lighting, no matter what it was, was positioned in such a way that it cast a shadow for anybody approaching that step, and that further compounds the problem, the fact that the lights are between or behind the person approaching the bathroom door, which tends to conceal the fact that there is a fairly high step there or a step-up or whatever you would call it.
>
> There's a good bit of evidence . . . now, both of those conditions have apparently existed for I don't know how long, but apparently for as

> long as anybody knows. It was testified here and apparently for at least for some years. There's no evidence that there's been any change in those conditions there . . . .
>
> Now, there's evidence that the hallway was dim at the time that the plaintiff entered it, as opposed to completely dark, which I think would really put a plaintiff on notice. You don't walk down a dark hallway where you can't see at all, but it was dim. And I think the obligation of the plaintiff would be quite reduced as far as her comparative fault, if any, because it's fairly well lighted. I mean, it's dimly lighted, but at least lighted to some degree. Now, whether that dim lighting was because a light went out after Mr. Burns was down there working or not . . . I don't know. Yeah, the door was open to improve the lighting. But I think whether that lighting was – grew dim because a bulb went out after Mr. Burns was there, or whether it was dim all the time just because of the lighting that was there, I don't know for sure. But I think there is enough with . . . the step or the high threshold and the position of the lighting . . . for the [c]ourt to find that there's a condition there that, at least by – that the county – having been there for so long, should have been aware that that condition existed. And that it is a defect that's – for somebody that uses it every day would – should become apparent. But for somebody who is going there for the first time, which this lady testified she had never been there before, and because of the colors and all and the lighting and the shadowing . . . I don't find any negligence on her part. And it's a – like I say, it's a close call, but that's the way I see those facts. And I find that, therefore, the county would have liability and the plaintiff would not be – would not have – well, I would not assign fault to her.

In its judgment, entered August 23, 2004, the trial court held that the plaintiff was guilty of no negligence, and that the county was responsbile for 100% of the fault. The court awarded the plaintiff a judgment of $60,000. The plaintiff's husband was awarded $15,000.

III.

On appeal, the county challenges the trial court's findings that the position of the lighting was part of the allegedly dangerous condition, and that the county was on notice of the allegedly dangerous or defective condition created by the elevated threshold and the position of the lighting. The county also challenges the trial court's judgment that the plaintiff was not negligent. These issues can be reduced to two questions:

> (1) Does the evidence preponderate against the trial court's determination that the county was guilty of negligence that proximately caused the plaintiff's fall and resulting injuries?
>
> (2) Does the evidence preponderate against the trial court's determination that the plaintiff was not guilty of any fault?

We will address each issue in turn.

IV.

Our review of an appeal from a bench trial is *de novo* upon the record of the proceedings below. Tenn. R. App. 13(d). In reviewing that record, we accord a presumption of correctness to the trial court's factual findings, unless the evidence preponderates against them. ***Id.*** We apply the same standard of review when addressing the allocation of fault in bench trials. ***Cross v. City of Memphis***, 20 S.W.3d 642, 645 (Tenn. 2000).

The plaintiff brought this action pursuant to the Governmental Tort Liability Act ("GTLA"), codified at Tenn. Code Ann. § 29-20-101, *et seq*. The provision relevant to the instant case provides as follows:

> (a) Immunity from suit of a governmental entity is removed for any injury caused by the dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement owned and controlled by such governmental entity.
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> (b) Immunity is not removed for latent defective conditions, nor shall this section apply unless constructive and/or actual notice to the governmental entity of such condition be alleged and proved in addition to the procedural notice required by [Tenn. Code Ann.] § 29-20-302 (repealed).

Tenn. Code Ann. § 29-20-204 (2000). This section essentially codifies the common law obligation of owners and occupiers of property. ***Lindgren v. City of Johnson City***, 88 S.W.3d 581, 584 (Tenn. Ct. App. 2002). In general terms, the common law obligation imposes upon such owners/occupiers a duty to "exercise ordinary care and diligence in maintaining their premises in a safe condition." ***McCormick v. Waters***, 594 S.W.2d 385, 387 (Tenn. 1980). This includes an affirmative duty to protect against dangers of which the owner/occupier knows or of which, with reasonable care, it might have discovered. ***Id.***

The plaintiff must first demonstrate that there is a "dangerous or defective condition of any public building . . . owned and controlled by such governmental entity." Tenn. Code Ann. § 29-20-204(a). The determination of whether a particular location is defective, dangerous or unsafe is a question of fact. ***Helton v. Knox County***, 922 S.W.2d 877, 882 (Tenn. 1996). In determining if a condition is, in fact, defective, unsafe, or dangerous, the Supreme Court has noted that with respect to the likelihood of a person sustaining an injury, "probability, not possibility, governs; that it is 'possible' . . . does not make it dangerous." ***Id.*** at 883 (quoting ***Forrester v. City of Nashville***, 169 S.W.2d 860, 861 (Tenn. 1943)).

Liability in premises liability cases stems from superior knowledge of the condition of the premises. ***McCormick***, 594 S.W.2d at 387. Therefore, upon finding that a dangerous condition exists, the plaintiff must then demonstrate that the county had either actual or constructive notice of the allegedly dangerous condition. *See* Tenn. Code Ann. § 29-20-204(b). This may be accomplished in one of two ways. The first method is by demonstrating that the county itself caused or created the condition, therefore imputing notice to the county. *See* ***Sanders v. State***, 783 S.W.2d 948, 952 (Tenn. Ct. App. 1989). If an entity other than the owner or operator of the premises created the condition, the plaintiff must show that the owner or operator of the premises had actual or constructive notice of the condition prior to the accident. ***Jones v. Zayre, Inc.***, 600 S.W.2d 730, 732 (Tenn. Ct. App. 1980). "Constructive notice" can be established through proof that the dangerous or defective condition existed for such a time that in the exercise of reasonable care, the owner should have become aware of the condition. ***Simmons v. Sears, Roebuck & Co.***, 713 S.W.2d 640, 641 (Tenn. 1986). We review the trial court's judgment in light of these principles of law.

V.

The trial court found that a dangerous condition existed. The court reasoned that the danger resulted from the combination of the elevated threshold and the position of the lighting. The county challenges this holding. It argues that the "position of the lighting" was not a part of the dangerous or defective condition. The county's challenge requires that we determine if the evidence preponderates against the trial court's finding that the position of the lighting *and* the raised threshold, *in combination,* resulted in a "dangerous or defective condition." *See* Tenn. Code Ann. § 29-20-204(a).

The county argues that the evidence proffered at trial fails to demonstrate that the position of the fluorescent lighting prevented the plaintiff from seeing the threshold. Several parties testified that the lighting was dim on the day of the incident. However, as the court noted during the trial, it was unclear as to when the lighting, for whatever reason, reached a "dimmed" state because there was no evidence of how long the lighting had been in that condition.

James Skeen, the plaintiff's expert witness, stated the following with respect to the lighting:

> Q: . . . What happens when you put the body of someone who's walking – who's prepared to walk into the bathroom between the overhead light and the step in the doorway – the door facing that goes into the bathroom?

> A: Certainly, a person is going to be blocking some of the light that they need to see the floor as they approach the doorway.

The defendant argues that Mr. Skeen's testimony is insufficient to demonstrate that the position of the lighting was problematic. None of the witnesses present on the day of the incident testified about shadows on the threshold. Rather, the dispute at trial centered around the witnesses' recollection as to whether any of the bulbs were, in fact, burned out. The county also proffers that if we accept as true the testimony of some witnesses that they believed one of the lights was out, it cannot be said that the position of the light caused the problem because no shadow would be cast.

We hold that the evidence does not preponderate against the trial court's judgment that the position of the lighting contributed to the dangerous condition created by the threshold.[2] In support of our decision, we rely upon our decision in the case of ***Wilson v. City of Lebanon***, No. 01-A-019110CV00353, 1992 WL 279863 (Tenn. Ct. App. M.S., filed October 14, 1992). The plaintiff in ***Wilson*** brought an action against the City of Lebanon for injuries he sustained outside city hall when he stumbled over a crack in the sidewalk. ***Id.***, at *1. The plaintiff contended that the city was negligent because it failed to maintain the sidewalk and because it failed to place safety or lighting equipment in a position to warn of the dangerous condition created by the sidewalk. ***Id.*** In reviewing the decision below, we declined to find liability based on the allegation that the light bulbs were out because there was no evidence as to how long the light bulbs had been burned out. ***Id.***, at *2. We held that the city could not be held liable for the burned out bulbs alone because light bulbs burn out periodically without any warning, and there was no evidence to conclude that the city should have discovered the defect and replaced them. ***Id.*** We did find, however, that the city was liable for the design of the light fixtures on the building. ***Id.***, at *1. Since the fixtures caused the light to shine horizontally, they cast little illumination on the sidewalk, thereby creating a dangerous condition. *See* ***id.***

We hold that the evidence does not preponderate against the trial court's judgment that the position of the fluorescent lighting, when combined with the height of the threshold, created a dangerous condition.

VI.

The county argues that it did not have constructive notice of either the height of the threshold or the position of the lighting, and therefore it cannot be held liable. *See* Tenn. Code Ann. § 29-20-204(b).

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[2] On the subject of the threshold, the county argues that the references made by the plaintiff's expert to the *current* code's requirements with respect to the permissible height of thresholds is not relevant. It contends that the threshold should be evaluated against the building code, if any, existing in 1836 when the building was built. This argument misses the point. The question before the trial court was whether the condition of the threshold and the position of the lighting, in combination, constituted a dangerous or defective condition. It was not necessary for the court to find a code violation in order to conclude that the condition in the basement presented a dangerous condition requiring affirmative action on the part of the county.

The trial court held that the county had notice by virtue of the length of time that the dangerous condition had been in existence. However, the issue of how long the condition existed is irrelevant in cases involving design or construction defects. ***Wilson***, 1992 WL 279863, at *2. When a governmental entity "construct[s] the offending instrumentality [the entity] must be charged with notice of its condition as constructed." ***Id.*** (quoting ***Sanders***, 783 S.W.2d at 952). The county constructed the threshold and installed the light fixture. Therefore, the county's argument fails in light of the fact that the plaintiff need not demonstrate constructive notice when the county created the condition. *See* ***Sanders***, 783 S.W.2d at 952; ***Wilson***, 1992 WL 279863, at *2. Obviously, the county is chargeable with notice of that which it constructed.

VII.

Lastly, we address the county's contention that the trial court erred in failing to assign any fault to the plaintiff. In support of its argument, the county points out that the plaintiff testified that she could "hardly see anything." It is the county's contention that some degree of fault should have been assigned to the plaintiff in view of this testimony. The county argues that its position is supported by the decision of the Supreme Court in ***Eaton v. McLain***, 891 S.W.2d 587 (Tenn. 1994).

In assessing comparative fault, the Supreme Court has suggested several factors for a trial court to consider, the following of which appear to be relevant to the matter before us: (1) the relative closeness of the causal relationship between the county's conduct and the plaintiff's injury; (2) the reasonableness of the plaintiff's conduct in confronting a risk; and (3) the party's particular capacities, such as age, education, and training. ***Id.*** at 592.

In its decision, the trial court stated that the hallway was lighted "to some degree." The court noted that it was the first time the plaintiff had ever visited the basement of the courthouse. Although the court noted that a completely dark hallway would have put the plaintiff on notice of a heightened duty, the fact that the hallway was lighted "to some degree" prompted the trial court to determine that the plaintiff was not negligent.

We hold that the evidence does not preponderate against the trial court's judgment on the issue of fault. The evidence demonstrates that there was enough light in the hallway to justify the plaintiff walking toward the restroom. This evidence, coupled with the plaintiff's lack of familiarity with the area, does not preponderate against a finding that she was not chargeable with any degree of fault.

VIII.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of that court's judgment and the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Hawkins County, Tennessee.

CHARLES D. SUSANO, JR., JUDGE